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ABSTRACT

This paper presents a guide to fair use, particularly use of new media in the classroom. It begins with a brief overview of the fair use doctrine and then presents guidelines for copying of printed materials, use of videotaped materials, and the use of multimedia (the last summarized from the Consortium of College and University Media Center's 1996 guidelines). Noting that communication departments sometimes have their own computer labs for use in teaching classes and for student and faculty projects, the paper also discusses site licenses and shareware computer programs. It concludes with a word about public domain and the limitations of copyright protection. Contains a chart reviewing time limitations and copyright law. (RS)

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New Media in the Classroom and Copyright: A Guide to Fair Use

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New Media in the Classroom and Copyright: A Guide to Fair Use

The Fair Use Doctrine

The Fair Use Doctrine has been codified as section 107 of the U.S. Code, known as the Copyright Act of 1976. It specifies the circumstances under which copyrighted material may be used without the permission of the copyright holder and without paying royalties for the use. The Fair Use Doctrine consists of four factors to be considered in determining whether the use was "fair."

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work (the more originality or creativity in the work the more protection it deserves);
3. The amount and substantiality of the portion of the work used in relation to the copyrighted work as a whole; and
4. The effect of the use in question upon the potential market for or value of the copyrighted work. (NACS & AAP 1989, p. 4)

All four factors must be considered equally before a determination of "fair use" can be made. Educational use alone is not sufficient to make a use in question a fair one. While educational use would be a factor in favor of a fair use determination, many educational materials are for sale and using such materials without payment would not be fair in light of the fourth factor.

Your opinion that your use of a copyrighted program or article is covered by "fair use" will not prevent you from being sued for copyright violation. The Fair Use Doctrine cannot prevent lawsuits. It does, however, provide you with a potential defense to the

lawsuit. Such issues are determined on a case by case basis in the courtroom by the judge and/or jury.

Fair Use in the Classroom

Fair use of copyrighted material in the classroom is a complex issue and varies depending upon the type of copyrighted material being used. This section will be divided into three sections: Copying of printed materials, use of video taped materials, and the use of multimedia.

Copying of Printed Materials

The following guidelines have been developed by Congress to establish minimum permissible conduct under the Fair Use Doctrine for unauthorized copying. While these guidelines do not cover every possible circumstance, copying that complies with these guidelines is generally considered permissible.

The guidelines for making multiple copies without permission for use in an academic setting contain the following prohibitions:

1. Unauthorized copying may not be used to create, replace or substitute for anthologies, compilations or collective works, whether or not such unauthorized copies are collected and bound together or are provide separately.
2. Unauthorized copies may not be made of "consumable" works, including workbooks; exercises; standardized tests, test booklets and answer sheets; and the like.
3. Unauthorized copying may not substitute for the purchase of books, publisher's reprints or periodicals.

4. Higher authority, such as a dean or chairman of the department may not direct unauthorized copying.
5. The same teacher cannot copy the same item without permission from term to term.
6. No charge shall be made to the student beyond the actual cost of the photocopying.

The guidelines further indicate that multiple copying is allowed in the following situations:

1. When an individual teacher is "inspired" to use a work and the inspiration, decision to use it and moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission. **And**
2. If the following limitations with regard to the amount of copying of a work are applied:
   A. If a *complete* article, story or essay is copied, and the work copied is less than approximately 2,500 words.
   B. If a prose work is excerpted and copied, and the excerpt copied is no longer than approximately 1,000 words or 10% of the work, *whichever is shorter.*
   C. If a chart, graph, diagram, drawing, cartoon or picture is copied, and not more than one such *illustration* is copied per book or per periodical issue.

D. If a short *poem* is copied, and the poem is less than 250 words and printed on not more than two pages; or if an excerpt from a longer poem is copied, and the excerpt is not longer than 250 words. **And**

3. The copying is for only one course in the school in which the copies are made. **And**

4. No more than one short poem, article, story or essay or two excerpts are copied from the same author. In addition, no more than three works or excerpts may be copied from the same collective work or periodical volume during one class term and o more than nine instances of such multiple copying may occur for one course during one class term. (The limitations in this paragraph do not apply to current news periodicals, newspapers, and current news sections of other periodicals.) **And**

5. The original copyright notice must appear on all copies of the work. (NACS & AAP 1989, pp. 5-6)

Use of Videotaped Materials

Section 110 of the U.S. Code describes the permissible uses of videotapes and films in the classroom. Such uses are considered fair if:

1. The performance is by instructors, guest lecturers, or by students.
2. The class is part of the regular curriculum.
3. The performance is in connection with face-to-face teaching activities.
4. The entire audience is involved in the teaching activity.
5. The entire audience is in the same room or same general area.
6. The teaching activities are conducted by a non-profit educational institution.

7. The performance takes place in a classroom or similar place devoted to instruction, such as a school library, gym, auditorium or workshop.
8. The videotape is lawfully made; the person responsible had not reason to believe that the videotape was unlawfully made. (Sylvester 2000)

Pre-recorded videotapes that are labeled for "home use only" may be used in the classroom provided they are being shown by the instructor, guest lecturer, or by a student as per the guidelines set out in Section 110.

The rules for showing "off-air" recordings were developed in 1979 by a committee consisting of representatives of educational organizations, copyright proprietors, and creative guilds and unions under the authority of the House Subcommittee on Courts, Civil Liberties and Administration of Justice. The guidelines developed are as follows:

1. The guidelines apply only to off-air recording by nonprofit educational institutions.
2. A broadcast program may be recorded off-air from either broadcast or cable/satellite and retained for 45 days following its recording. At the end of the 45 days, the videotape must be erased or destroyed immediately.
3. Individual teachers may use such recordings once in the course of relevant teaching activities (with one repeat performance to reinforce instruction if necessary). These performances can take place in the classroom and other similar places devoted to instruction within the first ten consecutive school days in the 45-day retention period. School days are school session days – not

counting weekends, holidays, vacations, examination periods, and other scheduled interruptions.

4. The school only at the request of an individual teacher can make off-air recording. The school cannot anticipate such requests. No broadcast program may be recorded off-air more than once at the request of the same teacher, regardless of the number of times the program is broadcast.
5. A limited number of copies may be reproduced of each off-air recording to meet the legitimate needs of teachers under these guidelines. (Sylvester 2000)

Transmission of copyrighted programs through closed-circuit systems requires a license. Some educational film and video distributors grant closed-circuit educational transmission licenses free upon request while other companies charge a fee.

As provided for under The Digital Millennium Copyright Act, the Copyright Office recently investigated "fair use" in the context of distance education and concluded that the performance of a copyrighted work by transmission is not an infringement of copyright if the transmission is made as a regular part of systematic instructional activities of a non-profit educational institution, directly related and of material assistance to teaching the content of the transmission, and made primarily for reception in classrooms or by persons where disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction. (Powers 1999) It would seem important, however, that the transmission is secured in a way to prevent access by the general public.

Fair Use of Multimedia

Educational multimedia projects are defined as projects that incorporate students' or educators' original material, such as course notes or commentary, together with various copyrighted media formats including but not limited to, motion media, music, text material, graphics, illustrations, photographs and digital software which are combined into an integrated presentation. In 1996 the Consortium of College and University Media Centers published guidelines for the acceptable uses of multimedia materials for educational purposes that would not infringe on owners' copyright. Following is a summary of those guidelines:

Preparation of Educational Multimedia Projects Using Portions of Copyrighted Works

1. Students may incorporate portions of lawfully acquired copyrighted works when producing their own educational multimedia projects for a specific course.
2. Educators may incorporate portions of lawfully acquired copyrighted works when producing their own educational multimedia projects for their own teaching tools in support of curriculum-based instructional activities at educational institutions.

Permitted Uses of Educational Multimedia Projects

1. Students may perform/display their projects for educational uses in the course for which they were created and may use them in their own portfolios as examples of their academic work for later personal uses such as job and graduate school interviews.

2. Educators may perform and display their projects to students in the following situations:

   A. for face-to-face instruction,

   B. assigned to students for directed self-study,

   C. for remote instruction to students enrolled in curriculum-based courses and located at remote sites, provided over the educational institution's secure electronic network in real-time, or for after class review or directed self-study, provide there are technological limitations on access to the network and educational multimedia project and provided further that the technology prevents copying of the copyrighted material. If the institution's network cannot prevent such copying, students or educators may use the projects over an otherwise secure network for a period of only 15 days after its initial real-time remote use in the course of instruction or 15 days after its assignment for directed self-study. After that period, one of two use copies of the project may be placed on reserve in a learning resource center, library or similar facility for on-site use by students enrolled in the course. Students shall be advised that they are not permitted to make their own copies of the project.

3. Educators may perform/display their projects to their peers at workshops and conferences.

4. Educators may retain their projects in their personal portfolios for later personal use such as tenure review or job interviews.

Limitations – Time, Portion, Copying and Distribution

1. Educators may use their projects for teaching courses for a period of up to two years after the first instructional use with a class. Use beyond that time period, even for educational purposes, requires permission for each copyrighted portion incorporated in the production.
2. The following are the portion limitations for how much of a copyrighted work may be incorporated into multimedia projects:
    A. Motion Media – up to 10% or 3 minutes, whichever is less.
    B. Text Material – Up to 10% or 1000 words, whichever is less. An entire poem of less than 250 words may be used, but no more than three poems by one poet, or five poems by different poets from any anthology may be used.
    C. Music, Lyrics, and Music Video – Up to 10%, but in no event more than 30 seconds, of the music and lyrics from an individual musical work (or in the aggregate of extracts from an individual work). Any alterations to a musical work shall not change the basic melody or the fundamental character of the work.
    D. Illustrations and Photographs – A photograph or illustration may be used in its entirety but no more than five images by an artist or photographer may be used. When using photographs and illustrations

from a published collective work, not more than 10% or 15 images, whichever is less, may be used.

E. Numerical Data Sets – Up to 10% or 2500 fields or cell entries, whichever is less, from a copyrighted database or data table may be used. A field entry is defined as a specific item of information, such as a name or Social Security number, in a record of a database file. A cell entry is defined as the intersection where a row and a column meet on a spreadsheet.

3. Only a limited number of copies, including the original, may be made of an educator's project. No more than two use copies may be made, and only one of those may be placed on reserve. A third copy may be made for preservation purposes and may only be used or copied to replace a use copy that has been lost, stolen or damaged. In the case of jointly created projects, each principal creator may retain one copy for use exclusively for presentation to peers or for personal uses.

In creating multimedia projects, educators and students should be careful to include the following information in the project:

1. Credit the sources of copyrighted information by adequately identifying the source of the work, giving a full bibliographic description where available. Include the copyright notice if available (includes the copyright symbol or the word "copyright," the year of first publication, and the name of the copyright holder).

2. Include on the opening screen of the project and any accompanying print material a notice that certain materials are included under the fair use exemption of the U.S. Copyright law and have been prepared according to the educational multimedia fair use guidelines and are restricted from further use.
3. Note any alterations that have been made to copyright materials. Alterations may be made only if they support specific instructional objectives. (ADEC 1996)

Site Licenses and Shareware

Communication departments sometimes have their own computer labs for use in teaching classes and for student and faculty projects. In setting up a computer lab, care must be taken that all software be obtained legally.

A site license is a way to gain a bulk discount when purchasing software for a computer lab. Basically, site licenses fall into three categories:

1. Unlimited Licenses – for a set fee, the school can use as many copies of the software purchased as it wants. This is relatively rare and, when available, very expensive. Unless you need to equip more than 100 machines, you are probably better off obtaining a bulk license.
2. Bulk Licenses – for a set fee, the school can use a limited number of copies of the software in question. Prices are based on the number of computers you wish to equip with the software.
3. Discount Programs – in exchange for a set fee, the school receives a substantial discount when making any further purchases from the company in question for the period of the license (usually one-year). Not recommended

unless you know you will be making enough purchases to make the license fee worthwhile. (Univ. of Chicago, 2000)

Not all software needed in a computer lab is available in a site license. Without a site license, you must purchase a separate copy of each piece of software for every machine you load it on.

Useful software programs are sometimes available as Freeware or Shareware. Freeware programs may be downloaded from the Internet and used without any payment. Read carefully and abide by the "restrictions on use" statements associated with such programs.

Shareware programs generally are downloadable for free with the agreement that, if you retain the program, you will pay a set fee per copy used. These fees are generally very reasonable, in the $15-$50 range. In order to "encourage" users to honor the payment requirement, such programs are often available for free in a form that is either not fully functional (functional enough to give you an idea of what it can do) or in a form that will cease functioning after a set period of time if the fee is not paid. Once the fee is paid and the software user registered, the provider will either send/make available a fully functional version of the software to download or send a password the user can use to "unlock" the nonfunctional segments of the program. This system gives a potential user an opportunity to try the software before buying.

In managing a computer lab, it is important to discourage student and faculty users from downloading programs into lab machines. Lab managers should check machines for illegal downloads frequently and delete such programs whenever found.

Protecting Your Own Work

Whenever you create intellectual property in any of its varied forms, your creation is protected by copyright from the moment it takes some sort of tangible form. This means that you may sue an infringer for copyright violation in court. The copyright need not be registered with the U.S. Copyright Office prior to the infringement, though registration must be made before the lawsuit can proceed. Registration prior to the infringement simply allows for greater damage awards.

It is, however, a good idea to retain evidence of the date of creation. This will help you prove that you created the intellectual property first should the need arise. One traditional method is to mail a copy of the work to yourself and retain the sealed envelope. Computer files have "dates of creation/last modification" attached to them. Make sure your computer's date function is accurate. (Donaldson 1996)

It is also helpful to mark your work with the copyright symbol, date, and name of copyright holder. While this is not legally required, it will help convince a court that the infringer "should have known" the work was copyrighted. For works stored in multimedia form, it is wise to have the copyright notice incorporated into the presentation/video and physically written on the disk/cassette that contains the work.

You should be aware that publishing your work on the Internet leaves you vulnerable to copyright infringement. You do not lose your copyright when you put information on the Internet, but you do lose most of your control over how the information is used. You should put the copyright information on the web pages you publish along with information regarding permissible uses.

One way to retain better control over work published on the Internet is to publish behind a "firewall." When published this way, only those you authorize will have access to your work. For example, rather than give away to the world your syllabus and notes for your innovative new class by publishing on the open Internet, you can publish behind a firewall and give your students access through a password. If you are intending to mix and match your own work with other people's copyrighted work, then this is the only way to "fairly" publish to a computer network.

Software programs are also being developed that can protect image files and audio/video files from being downloadable when published on the Internet. Such programs allow you to publish these files and browsers to view/hear them, but a browser cannot save copies for their own use. Other software programs allow you to insert a digital "watermark" on your images, etc. that identify them as your work. These watermarks are not usually visible to a browser but are clearly visible when the code is examined. They are also useful as targets for "web spiders." Web spiders are computer programs that search the World Wide Web for files containing the watermarks they are programmed to find. Large corporations are using this system to locate people who have used their copyrighted images in web pages without permission.

If you are really worried about people stealing your intellectual property from the Internet then **don't publish it!**

A Word about Public Domain

Public domain works are not covered by copyright and are free to use and reuse. Copyright protection is for a limited time only. Any works published before 1923 are now in the public domain. Works published between 1923 and 1977 may have lost their

copyright because the copyright holders neglected to mark them . It is often difficult to tell if a work published after 1923 is still copyrighted. The best course of action is to assume it is. See the chart appended to this paper for a review of time limitations and copyright law. (Gasaway 1999)

Generally, works created by the federal government are exempt from copyright protection and may be used freely. However, if the actual creator of a work published by the U. S. Government is not an employee of the government, that creator may have a legal claim to copyright in the final work. The only way to know for certain whether a U.S. Government film, videotape, etc. is public domain is to review the contract between the government and the work's creator. (Lutzker 1997)

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Title 17 U.S. Code Sections 107, 110

The University of Chicago Desktop & Personal Computing Site License Office (2000) "Frequently Asked Questions" http://www-ccs.uchicago.edu/Licensing/FAQ.html

WHEN WORKS PASS INTO THE PUBLIC DOMAIN

Includes material from new Term Extension Act, PL 105-298

DATE OF WORK	PROTECTED FROM	TERM
Created 1-1-78 or after	When work is fixed in tangible medium of expression	Life + 70 years[1](or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation[2]
Published before 1923	In public domain	None
Published from 1923 - 63	When published with notice[3]	28 years + could be renewed for 47 years, now extended by 20 years for a total renewal of 67 years. If not so renewed, now in public domain
Published from 1964 - 77	When published with notice	28 years for first term; now automatic extension of 67 years for second term
Created before 1-1-78 but not published	1-1-78, the effective date of the 1976 Act which eliminated common law copyright	Life + 70 years or 12-31-2002, whichever is greater
Created before 1-1-78 but published between then and 12-31-2002	1-1-78, the effective date of the 1976 Act which eliminated common law copyright	Life + 70 years or 12-31-2047 whichever is greater

1 Term of joint works is measured by life of the longest-lived author.

2 Works for hire, anonymous and pseudonymous works also have this term. 17 U.S.C. § 302(c).

3 Under the 1909 Act, works published without notice went into the public domain upon publication. Works published without notice between 1-1-78 and 3-1-89, effective date of the Berne Convention Implementation Act, retained copyright only if, e.g., registration was made within five years. 17 U.S.C. § 405.

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